

IN THE MATTER OF THE SECURITIES ACT
R.S.N.S. 1989, Chapter 418, as Amended ("Act")

- and -

IN THE MATTER OF
GLOBEINVEST CAPITAL MANAGEMENT INC. ("Respondent")

REASONS FOR THE DECISION

Date of Hearing: January 23, 2008

Date of Decision: February 12, 2008

Panel:

J. Walter Thompson, Q.C.

Representatives:

Brian K. Awad

For Globeinvest Capital Management Inc.

Heidi Schedler

For Staff of the Nova Scotia Securities
Commission

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REASONS FOR THE DECISION

In August, 2001, The North British Society, a venerable Nova Scotia institution, solicited the investment management services of the Toronto firm, Globeinvest Capital Management Inc. Globeinvest agreed to act and began to carry on business for the Society. I want to say at the outset that there is no suggestion that Globeinvest defaulted in its obligations to the Society, but Globeinvest neglected to register with the Nova Scotia Securities Commission as required by law. Globeinvest discovered this compliance failure some years later and rectified it effective January 17, 2007. The fact remained, however, that Globeinvest had acted in violation of the registration requirements. It was therefore subject to penalty.

Globeinvest and the Commission Staff negotiated a Settlement Agreement under the General Rules of Practice and Procedure of the Nova Scotia Securities Commission. Globeinvest signed the Settlement Agreement on August 30th. Staff signed it on September 19th.

Settlement agreements are provided for in Part 10 of Rules of Practice and Procedure. The Settlement Agreement in this case is a 6 page document. It begins with an Introduction. The Introduction provides that it is in the public interest for the Commission:

1. to approve this settlement,
2. to determine that Globeinvest violated the Act or regulations,
3. to make an order that Globeinvest pay an administrative penalty of \$5,000.00
4. and costs of \$750.00.

Part III of the Settlement Agreement is an agreed Statement of Facts which include the following:

1. The North British Society contacted Mr. Peter Brieger of Globeinvest and Mr. Brieger began managing one of the Society's portfolios in September, 2001.
2. Mr. Brieger acted as an advisor from September 2001 until January 17, 2007 without being registered contrary to s. 31(1)(c) of the Securities Act.
3. Globeinvest self-reported the violations to Staff and fully cooperated by providing all relevant information.

Part VIII , in a standard form, provides:

VIII DISCLOSURE OF SETTLEMENT AGREEMENT

21. Staff or Globeinvest may refer to any or all parts of this Agreement in the course of the hearing convened to consider this Agreement. Otherwise, this Settlement Agreement and its terms will be treated as confidential by all parties to it until approved by the Commission, and forever if, for any reason whatsoever, this settlement is not approved by the Commission.

The procedure is for the Settlement Agreement to be presented to a Settlement Panel of the Commission itself for approval. In this case, the Settlement Panel was me. On the day of the approval hearing, Globeinvest, through its counsel, strongly objected to the fact that the Notice of Hearing and Statement of Allegations prepared by staff to initiate the proceeding had become public. Globeinvest sought an adjournment to reconsider its agreement to settle the matter. I granted the adjournment.

The Notice of Hearing and the Statement of Allegations are both dated September 24, 2007. It is important, I think, to compare the contents of these documents with the contents of the Settlement Agreement. The Notice of Hearing states:

- The date, place and time of the hearing and that the hearing is held under sections 135 and 135 A of the Act
- that the purpose of the hearing is
to approve a Settlement Agreement

to make an order that Globeinvest pay an administrative penalty of \$5,000.00

and costs of \$750.00.

The Statement of Allegations alleges that:

- On August 6, 2001 Mr. Brieger was contacted by an agent of the North British Society
- Mr. Brieger began managing a portfolio for the Society in 2001
- Mr. Brieger became registered in Nova Scotia effective January 17, 2007
- From 2001 to 2007, Mr. Brieger acted as an advisor to the Society without being registered to do so contrary to s. 31(1)(c) of the Act.

The Notice of Hearing and the Statement of Allegations contain the adverse particulars of the Settlement Agreement.

Globeinvest took offence and obtained the adjournment because the Notice of Hearing for the approval of the Settlement Agreement and the Statement of Allegations were made public by posting them on the Securities Commission web site a couple of days before the date set for the approval hearing, September 26. I hasten to add that the posting is standard operating procedure for the Commission Staff and there is no suggestion that Globeinvest was treated any differently than anyone else with whom a Settlement Agreement had been made. The posting was, however, picked up and reported upon by the press. In particular, a subscription web journal named ALLnovascotia.com posted a story which summarized the Statement of Allegations saying that Globeinvest had acted for the North British Society between 2001 and 2007 without being registered and had agreed to an administrative penalty of \$5,000.00 and \$750.00 in costs.

Staff filed a new Notice of Hearing and Statement of Allegations dated December 14th and 13th respectively to resume the adjourned Globeinvest hearing on January 23, 2008. This Notice did not contain the paragraph referring to the Settlement Agreement and provided for an increased penalty of \$16,500.00 and costs of \$2,000.00.

Globeinvest's embarrassment was compounded when Staff posted and thereby made public this new Notice of Hearing and Statement of Allegations. This posting was picked up by the *Halifax Chronicle Herald* which published a story on

December 27 on its business page with the lead:

A well known Business News Network commentator who heads Toronto-based **Globeinvest Capital Management Inc.** is in hot water with the Nova Securities Commission.

The story went on to state particulars.

Globeinvest issued a Notice of Hearing - Motion pursuant to Part 11 of the General Rules seeking relief in a stay of proceedings, costs, and such other relief as the Commission may see fit. Globeinvest still acknowledges its violation, but it says the manner in which Staff has conducted the proceeding is wrong. With the agreement of Staff counsel, Globeinvest requested that its application be heard together with a hearing on the Staff Allegations. I agreed since liability is acknowledged, and thus the hearing of the Staff Allegations really boils down to a hearing on a stay or on penalty.

Staff commenced this proceeding in September and gave notice in December under section 3.1 of the Nova Scotia Securities Commission General Rules of Practice and Procedure which provides:

A Hearing may be commenced by an Applicant delivering a Statement of Allegations to the Secretary together with a written request for a Hearing pursuant to Nova Scotia securities laws. The Secretary shall prepare a Notice of Hearing.

Section 3.4 provides:

The Notice of Hearing and the Statement of Allegations are, once served, public documents, unless otherwise ordered by the Commission.

And 3.5:

The Notice of Hearing and Statement of Allegations may be drafted in a manner which does not make the identity of the persons or companies, other than the Parties, apparent on the face of the pleadings. This may be achieved by the use of initials, assignment of alphabetical or numerical characters, general description, or as may be otherwise appropriate in the circumstances. In such a case, the Parties named on the Notice of Hearing will provide or be provided with an Identification List.

Part 10 of the Rules provides for Settlements. 10.1 says that settlement discussions may occur at any time, including prior to the issuance of a Notice of Hearing. 10.2 says that a settlement is evidenced by a Settlement Agreement. 10.3 says that an agreement is subject to review and approval by a Settlement Panel. 10.4 says:

The Secretary shall prepare a Notice of Hearing for a Settlement Hearing. The Notice of Hearing shall be served upon the Parties to the Settlement Agreement. Copies of the Settlement Agreement will be forwarded to and distributed by the Secretary to the Settlement Panel in advance of the date set for the Settlement Hearing.

10.6 says:

Unless the Settlement Panel otherwise determines, the Settlement Agreement shall not be made public prior to its approval by the Settlement Panel. Upon approval by the Settlement Panel, the Settlement Agreement shall become a public document.

Sections 10.7 and 10.8 provide that a Settlement Hearing may be held in camera. Sections 10.9 through 10.12 provide for the procedure when the Panel does not approve the Agreement.

The Agreement itself provides:

VIII DISCLOSURE OF SETTLEMENT AGREEMENT

21. Staff or Globeinvest may refer to any of all parts of this Agreement in the course of the hearing convened to consider this Agreement. Otherwise, this Settlement Agreement and its terms will be treated as confidential by all parties to it until approved by the Commission, and forever if, for any reason whatsoever, this settlement is not approved by the Commission.

In my view, Staff, by posting the substance of the agreement on the website, did in effect make the Settlement Agreement public and did not treat it as confidential. There are few particulars in the Settlement Agreement that are not in the Notice of Hearing and the Statement of Allegations. The common particulars are the name of Globeinvest, the name of the party in Nova Scotia with whom Globeinvest did business, the time during which Globeinvest was not registered, the section of the Securities Act that Globeinvest violated and under which penalties would be imposed and the actual penalty which Globeinvest had

agreed to accept. The particulars stated in the Settlement Agreement but not contained in the Notice of Hearing and Statement of Allegations are, ironically, the mitigating factors; that Globeinvest had self-reported and cooperated fully.

There is a difference, in my opinion, between a document being a public document (Rule 3.4) and making a document public (Rule 10.6). Staff made the Settlement Agreement public by posting the Notice of Hearing and the Statement of Allegations on the web site.

In this case, the public particulars of the agreement made the confidentiality provisions of the Rule and the Agreement meaningless. If the words are to be meaningful, then the policy regarding the publication of Settlement Agreements arrived at prior to the issuing of a Notice and Statements of Allegations must be reconsidered.

The definition of Settlement Agreement stipulates the terms to be included. It says the Agreement is to include, among a list of other things, "a provision that the agreement will become a public document upon its approval by the Settlement Panel." The implication here again is that the agreement will not be made public beforehand.

The provisions of Rule 10, to be consistent with the confidentiality provisions, should be interpreted to provide a separate procedure for settlements. Rule 10 should not be read subject to Section 3.

Rule 10 outlines a separate procedure. Staff, under Rule 10, may prepare a Notice of Hearing for Settlement Hearing. Rule 10 does not mention a Statement of Allegations at all. I read the Rule, in the context of the confidentiality provisions, to have been drafted with the intent to dispense with a Statement of Allegations.

The underlying policy consideration is the encouragement of settlements. Confidentiality is an inducement to a party to make a settlement. Reverting to the procedure under Rule 3 subverts the policy.

Staff counsel argues that Globeinvest or its counsel could have made itself aware of the publication procedure used by staff. In my view, however, Staff should not leave it to the parties or their counsel to be aware of Staff procedures for making documents public or the wrinkles in the law. I suggest that, in fairness, Staff should advise a party, as a part of any settlement negotiation, what the procedures are and what the Rules provide.

I am also troubled that a second Notice of Hearing and Statement of Allegations were issued and made public. The Settlement Agreement was not, to my understanding, aborted at the hearing on September 26. Globeinvest was dismayed by the publication of its violation, but moved for time to reconsider its position. The order which emanated simply provided for an adjournment without day. We reconvened to consider the Globeinvest's motion for a stay and, if refused, then to consider penalty. Globeinvest never took issue with the facts in the Settlement Agreement. Thus, in my view, the Settlement Agreement of August-September remained before me, and only when, by agreement, penalty was to be reconsidered, did the Settlement Agreement go by the board.

There was, in my view, no need for further filing and making public of what are, as I see it, originating documents under the Rules. The filing of the second Notice of Hearing and Statement of Allegations was, in the circumstances, redundant. It was the Respondent's motion which brought the matter back before me. It was only by agreement between counsel that the motion and final resolution were integrated into one hearing.

Given that this matter had already attracted the attention of the news media, it became reasonably foreseeable that the Notice of Hearing and Statement of Allegations would attract attention once posted on the website. It was, and this time by a much higher circulation daily newspaper, *The Chronicle-Herald*. Staff was aware of Globeinvest's sensitivity since Globeinvest had raised a fuss at the September 26 hearing. That is not to say that Globeinvest should have special treatment, or that Staff ought to be intimidated. On the contrary, it is to suggest that the rules governing confidentiality of all such proceedings ought to be respected.

Counsel for Staff makes an argument that, if I understand it correctly, says Staff are not responsible for making the Notice and Statement public on the website. I do not have the facts before me, but I take it that the Secretary of the Commission itself is the person who is responsible for such a task. The argument is that the Secretary is not Staff.

Anyone who is not a commissioner appointed under s. 4(1) of the Act, is Staff. "Staff" means the staff of the Commission, including the Director. That seems to me to include the Secretary. In any event, Section 11 (1) of the *Securities Act* as amended *Stats. N.S. 2006, c.46, s.4* provides that the Commission shall appoint a secretary and prescribes his or her duties. These are duties that she performs as the designated person. I do not conclude that this is all the he or she might be expected to do as someone working for the Commission in its administrative offices. He or she may also perform many functions, such as posting notices on

a website, as a member of the Staff. I conclude that for the purposes of this proceeding, any functions performed by the secretary in making the Notice and Statement of Allegations public were accomplished as a member of Staff and not as a person designated under the Act.

I am satisfied then that Staff did not adopt the proper procedures in proceeding against Globeinvest. I am not satisfied, however, that Staff proceeded in bad faith or abused the process. The Rules are new having become effective only on June 18th, 2007 and are being interpreted for the first time.

I have given the Rules an interpretation different from the one under which Staff operated in posting the Notices of Hearing and the Statement of Allegations, but I cannot say that the Staff interpretation is arbitrary or perverse. I take it that the standard operating procedure for all proceedings has been to start with a Notice of Hearing and Statement of Allegations. These documents are analogous to an Originating Notice and a Statement of Claim which launch a court action. I have now said that Rules should be interpreted to provide a somewhat different manner of proceeding when Settlement Agreements are made before the Notice and Statements are issued. I believe this interpretation is more consistent with the confidentiality provisions relating to Settlement Agreements. In the same vein, I have challenged the standard procedures which Staff have followed. I think proceeding in the "old" way resulted in unfairness to Globeinvest, but I am not satisfied that simply following a policy based on a different interpretation of the law than the one I have made constitutes an abuse of process.

Mr. Brieger is prominent. His prominence made the posting more newsworthy and probably Globeinvest more sensitive to the publicity. These are not factors that could have or should have affected how Staff proceeded with the matter, nor is the impact something which Staff should have contemplated. Globeinvest, as it must be, was treated as anyone else with whom a Settlement Agreement had been made.

Staff erred too, in the circumstances, by filing and posting a second Notice of Hearing and Statement of Allegations. I expect that Staff thought that was the thing to do to bring the matter back before the Commission through a new Notice and Statement. Staff acted as if Globeinvest had aborted the Settlement Agreement and so could proceed as if it no longer existed. This, I see, was their logic. Indeed, Mr. Briedger, in his affidavit, does speak of repudiating the settlement. I disagree with the Staff interpretation, but I do not see that Staff abused the process by their own. The increased penalty, in my view, is simply a consequence of how staff saw the adjourned proceeding.

Staff, in seeking an increased penalty only did what it would have had a right to do at the January 23 hearing anyway. Globeinvest had put the terms of the Settlement Agreement in play through its motion. Staff was in its rights, at the hearing, to seek the increased penalty. Furthermore, that is all Staff has done. It has simply asked.

In summary, I am not satisfied, in the words of *R. v. O'Connor* (1995), 1 S.C.C. at pp. 39-40 that Staff has conducted this proceeding “in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.”

Globeinvest acknowledges that it has contravened the Act. I do, however, consider the manner in which Staff proceeded in assessing the appropriate penalty. The publication of the Notice of Hearing and the Statement of Allegations was a significant penalty to Globeinvest. I assess an administrative penalty of \$2,500.00 and award no costs. I ask counsel to prepare an appropriate order.



J. Walter Thompson, Q.C.
Panel Member
Nova Scotia Securities Commission

February 12, 2008